

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

RICHARD G. KIRBY,

Petitioner,

v.

CIV 08-886 MV/CG

JAMES JANECKA, Warden, and  
GARY K. KING, Attorney General  
for the State of New Mexico,

Respondents.

**ORDER FOR SUPPLEMENTATION**  
**&**  
**ADVISEMENT ON PROPER RESPONDENT**

This is a habeas matter under 28 U.S.C. § 2254 and is before the Court on the mandate of the Tenth Circuit. The Tenth Circuit remanded for consideration of the claims that remain after appeal – Grounds 1, 2, 4, 5, 6, and 7. *See Doc. 35-1.*

Because he filed his federal petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), its standards apply to this case. *E.g., Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *DeLozier v. Sirmons*, 531 F.3d 1306, 1319 (10<sup>th</sup> Cir. 2008). A jury convicted Petitioner of fraud, and the remaining claims raise issues of ineffective assistance of trial counsel, sufficiency of the evidence, withholding exculpatory evidence, and prosecutorial misconduct. *See Doc. 1* at 6, 8,

11, 12.1, 12.2, 12.4. Having reviewed the petition and Respondents' answer, I find I cannot conduct the appropriate review of Petitioner's remaining claims without additional supplementation of the federal record. I recognize that the age of the criminal case may make it difficult to compile the records, so I will give Respondents ample time to do so. See Rules 5(b)-(c), 7(a)-(c), RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

While the case was on appeal, Petitioner gave notice that he is no longer incarcerated and is nearing the end of his parole term. He therefore believed that Warden Janecka should not be named as a respondent. I denied the motion without prejudice pending the appeal. See *Docs. 27, 34*. In light of the supplementation, I will also request Respondents to advise the Court whether another official should be substituted for Warden Janecka, or whether he should be dismissed altogether. See 28 U.S.C. §§ 2242, 2243, 2254(a)-(b); Rules 2(a)-(b), RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Wherefore,

**IT IS HEREBY ORDERED** that the federal record be expanded and, by Friday, September 3, 2010. By that date, Respondents shall submit:

1. the state "record proper" for the district and appellate proceedings;
2. all transcripts or tapes of pretrial, trial, and post-trial proceedings (if the proceedings are taped, the Court would prefer Respondents to have them transcribed, see Rule 5(c) – "The judge may order that . . . parts of the untranscribed recordings be transcribed and furnished");
3. any pretrial and trial exhibits that are particularly pertinent to resolution of the federal claims; and

4. advise the Court of the proper respondent or respondents.

**IT IS FURTHER ORDERED** that by the same date, Petitioner and Respondents may submit any other materials they wish the Court to consider.

A handwritten signature in black ink, appearing to read "Cannon", with a long horizontal flourish extending to the right.

---

UNITED STATES MAGISTRATE JUDGE